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December 19, 2023

David J. Smith
Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Freddie Seltzer, et al. v. Morris-Shea Bridge Co., Inc., et al.*
Docket No. 21-13764

Dear Mr. Smith:

Defendants-Appellees submit this letter in response to Plaintiff-Appellant Larry Coleman's notice of supplemental authority.

Try as Plaintiff might, *Phillips v. Legacy Cabinets*, -- F.4th --, 2023 WL 8519216 (11th Cir. 2023) does not support Larry's arguments. The *Phillips* Court did not "reject" the holding of *Smith v. Vestavia Hills Bd. of Educ.*, 791 F. App'x 127 (11th Cir. 2019). In dicta in a footnote, the court observed that *Smith* was unpublished and therefore not binding, but in any event, the facts of *Phillips* were materially distinguishable because Phillips had "pleaded and argued a mixed-motive theory from the start." See *Phillips, supra* at *11, n.13 (pleading in the alternative that "[e]ven if [Legacy] had legitimate reasons for terminating her, [Phillips's] white race was at least a motivating factor ...").

Larry cannot say the same. At most, Larry alleged in mere passing that race motivated Defendants' actions, but he did not plead a mixed-motive theory¹, much less provide analysis and argument supporting it. See *Phillips, supra* at *11, n.13 (citing, among others, *Smith, supra* at 131 ("[The employee] did not plead or prove a mixed-motive case.")). Instead, before both the District Court and this Court,

¹ Larry's Complaint repeatedly alleges that Defendants violated 42 U.S.C. § 2000e-2(a)(1), i.e., a single-motive claim, see Doc. 18, ¶¶ 57, 74, 90, as opposed to § 2000e-2(m), i.e., a mixed motive claim.

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Larry stated, without any further analysis, that the evidence “could lead a reasonable jury to conclude that [Defendants’ employment decisions were] based, at least in part, upon [Larry’s] race.” *See, e.g.,* L. Coleman Br. at 52. This is insufficient to prevail at summary judgment (or on appeal). *See* Appellees’ Br. at 54-55 (citing authorities).

Further, Phillips’s mixed-motive theory survived summary judgment because she identified multiple valid comparators. *Phillips, supra* at *11. Larry did not identify *any* proper comparators, *see* Appellees’ Br. at 51-53, or produce any other evidence to establish that race motivated Defendants’ employment decisions. Thus, even if he had properly pleaded and argued a mixed-motive theory, he failed to support it with sufficient evidence to overcome summary judgment.

Respectfully submitted,

/s/ Amie A. Vague

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Counsel for Defendants-Appellees

cc: All Counsel of Record (via CM/ECF)

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing contains 348 countable words and that, on December 19, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filings to all counsel of record.

/s/ Amie A. Vague

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**RULE 26.1 CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, Appellees certify that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this case:

Best, Ivey E. – Counsel for Plaintiffs/Appellants (withdrawn as Counsel)

Clark, Kevin E. – Counsel for Defendants/Appellees

Coleman, Chester – Plaintiff/Appellant

Coleman, Larry – Plaintiff/Appellant

Coogler, The Honorable L. Scott – United States District Court Judge

Guerrier, Charles E. – Counsel for Plaintiffs/Appellants

Haynes, Alicia K. – Counsel for Plaintiffs/Appellants

Haynes and Haynes, P.C. – Counsel for Plaintiffs/Appellants

Heather Leonard, P.C. – Counsel for Plaintiffs/Appellants

Lehr Middlebrooks Vreeland & Thompson, P.C. – Counsel for
Plaintiffs/Appellants' Counsel

Leonard, Heather Newsom – Counsel for Plaintiffs/Appellants

Lightfoot, Franklin & White, LLC – Counsel for Defendants/Appellees

McCarthy, Terrence W. – Counsel for Defendants/Appellees

Morris-Shea Bridge Company, Inc. – Defendant/Appellee

Seltzer, Freddie – Plaintiff/Appellant

Shea, Richard J., Jr. – Defendant/Appellee

Vague, Amie A. – Counsel for Defendants/Appellees

Vreeland, Albert L., II – Counsel for Plaintiffs/Appellants' Counsel

Waldrop, E. Glenn, Jr. – Counsel for Defendants/Appellees

Wilkinson, Cynthia Forman – Counsel for Plaintiffs/Appellants

Wilkinson Law Firm, P.C. – Counsel for Plaintiffs/Appellants

CORPORATE DISCLOSURE STATEMENT

Morris-Shea Bridge Company, Inc. (“MSB”) certifies that it is an Alabama corporation with its principal place of business located in Irondale, Alabama. MSB further certifies that it does not have any parent company and no publicly held corporation owns 10% or more of its stock.

/s/ Amie A. Vague

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